IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 25, 2006 Session

PAULA KEETON v. ROBERT KLEIN, ET AL.

Appeal from the Circuit Court for Lewis County
No. 3483 Donald P. Harris, Judge

No. M2005-00475-COA-R3-CV - Filed on July 19, 2006

In this case a stay order in bankruptcy was lifted so that Plaintiff's case against the named Defendant could continue limited to insurance proceeds provided by his liability insurance carrier and by Plaintiff's uninsured/underinsured motorist carrier, with the named Defendant otherwise discharged in bankruptcy. From an adverse jury verdict and post-trial actions by the trial judge, the liability carrier appeals in the name of the named defendant. The judgment of the trial court is affirmed, except as to the award of prejudgment interest which is reversed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part, Reversed in Part, Remanded

WILLIAM B. CAIN, J., delivered the opinion of the court, in which WILLIAM C. KOCH, JR., P.J., M.S., and FRANK G. CLEMENT, JR., J., joined.

J. Russell Parkes and Wesley Mack Bryant, Columbia, Tennessee, for the appellant, Robert A. Klein.

Stephen Crofford and Mary Parker, Nashville, Tennessee, for the appellees, Ronald Keeton and Paula Keeton.

OPINION

Robert A. Klein was involved in a traffic accident with Ronald, Paula and Tabitha Keeton on February 8, 1998. The accident occurred when Tabitha Keeton, the driver of the plaintiffs' car was attempting to turn left off State Route 20E in Lewis County. Mr. Klein, who was traveling two cars back from the Keeton vehicle attempted to pass the intervening automobile and struck the Keeton vehicle in the midst of its turn. At the time of the accident, Mr. Klein carried liability insurance coverage up to a limit of $25,000. The Keetons carried uninsured/underinsured motorist coverage in the amount of $50,000. The Keetons sued Mr. Klein for negligently causing their injuries.

After an initial nonsuit, the Keetons re-filed their Complaint in Lewis County Circuit Court on July 25, 2000. Tennessee Farmers Mutual Insurance Company, the Keetons' uninsured/underinsured motorist carrier, was served as an unnamed defendant. Shelter Insurance, Mr. Klein's liability carrier, provided Mr. Klein's defense and filed an answer on his behalf on November 16, 2000. The case was originally set for trial September 19-20, 2002. This trial was continued to June 4-5, 2003 on the defendant's motion. On May 7, 2003, Mr. Klein, a soldier in the National Guard, again moved to continue the trial. He alleged that, due to his recent deployment to active duty in connection with Operation Enduring Freedom, and pursuant to the Soldiers' and Sailors' Relief Act of 1940, 50 App. USC section 501, *et seq*.; he was entitled to "suspension of legal proceedings and transactions which may prejudice" his civil rights. Prior to filing his first Motion to Continue, Mr. Klein had participated in discovery, and in connection therewith had given a discovery deposition. In this deposition, Mr. Klein admitted responsibility for the accident. In addition to his participation in discovery, Mr. Klein had filed a petition in Federal Bankruptcy Court on February 21, 2002. This petition effectively stayed all other proceedings concerning the alleged bankrupt's estate until, by agreement of Mr. Klein and the creditors in the federal bankruptcy proceeding, Case no. 102-02158-KL1-7, an order was entered on April 16, 2002, lifting the automatic stay solely as to the amount of Mr. Klein's insurance coverage. The Motion to Continue was considered via telephone conference, after which the trial court denied the continuance:

> This cause came on to be heard on the 12th day of May, 2003 before the Honorable Donald Harris, Circuit Judge for Lewis County, Tennessee. The Court, upon the briefs of the parties and the argument of Counsel, noted that the Defendant has been personally discharged by Chapter 7 bankruptcy and that the Bankruptcy Judge had previously signed an Agreed Order allowing the case to go forward against the insurance company for insurance proceeds only. The Court further noted that the Defendant has been deposed and read his deposition testimony on the issue of liability. The Court further questioned Defense Counsel as to the location of the Defendant and was informed that he was in Kentucky and Defense Counsel was unable to inform the Court as to why he couldn't be at the trial, or whether efforts had been made to assure his appearance at trial. Based on the information provided to the Court, as set forth above, and the record as a whole, the Court found that the Defense is not materially affected by reason of the military service of Mr. Klein. The Motion to Continue was, therefore, denied.
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Defendant's Motion to Continue based on the Soldiers' and Sailors' Civil Relief Act, be denied.

Defendant renewed this Motion at trial. The trial court understood the defendant's rationale for the continuance request but ruled against him a second time:

> Defendant [has] requested a continuance of the trial in this matter again [relying] upon the Soldiers' and Sailors' Civil Relief Act as codified in 50 app.

UCSA § 501 *et seq*. In Defendant's first motion for continuance, Defendant's counsel had filed the Defendant Robert Klein's deployment orders deploying him to Fort Campbell, Ky. In Defendant's renewed motion for continuance, Defendant's counsel submitted Mr. Klein's most recent deployment orders deploying the him to Kuwait, possibly until May 6, 2004. Defendant's counsel contended that Mr. Klein's presence was necessary for the defense of this case because Mr. Klein was a witness to the collision that was the subject matter of this litigation. Mr. Klein additionally was the witness to statements made by the Plaintiffs in this case. Mr. Klein has not had the opportunity to clarify or mitigate any statements Plaintiff's attorney extracted from him during his deposition. Finally, Mr. Klein is a member of the community in which this matter is set and his input in the selection, demeanor, and attitudes of the jurors in this case would be indispensable to the defense of Plaintiffs claims.

However, because Defendant admits that he was at fault in his deposition taken in this case and has filed bankruptcy leaving only his automobile liability carrier's policy subject to judgment in this matter, this Court finds that his appearance in trial is not necessary.
IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Defendant's Renewed Motion For Continuance is denied.

A jury was then empanelled and heard the cause. From this trial, the jurors rendered a verdict finding Mr. Klein ninety percent (90%) at fault; the jury deadlocked however as to the amount of damages to award. After the jury was dismissed, the following occurred:

THE COURT: Mr. Crofford, will you prepare an Order to reflect as far as we got today?

MR. CROFFORD: I'm a little unclear how it works in that situation.

THE COURT: Well, they've decided the liability issue. They've decided the damages as far as Mr. Keeton, and there's a mistrial as far as Ms. Keeton. We need that in an Order, though.

MR. PARKES: Is the damage issues binding? Not the damage issue, the portion of fault?

THE COURT: Yes.

MR. PARKES: And is that a Final Order from which I perfect my appeal?

The court thereupon entered the following order:

This cause came on to be heard before a jury of twelve (12) citizens on the 4th and 5th days of June, 2003. They jury, after hearing all the evidence and the arguments of counsel, found that the Defendant Robert Klein was ninety percent (90%) at fault for the accident and that Tabitha Keeton was ten percent (10%) at fault for the accident. The jury further assessed damages for loss of consortium to Ronnie Keeton in the amount of zero dollars. The jury was unable to come to a unanimous decision on the issue of damages that should be awarded to Paula Keeton, and a mistrial was declared on this issue.[1] The Court further instructed the parties that the jury's findings were not appealable nor final until the conclusion of the damages issue for Paula Keeton. The case was then recessed until additional proceedings were had.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the jury findings set forth above are made Orders of the Court.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the jury findings set forth above are not appealable, nor is it necessary at this time to file post-trial Motions.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the issue on the damages of Paula Keeton is reserved pending further Orders and/or a second trial.

Enter this 20th day of June, 2003.

The case was then tried on the issue of damages only on January 19th and 20th, 2005 with the verdict of the jury and the judgment being reflected in the trial court's order of January 26, 2005, which provided:

This cause [came] on to be heard on the 19th and 20th days of January, 2005 before the Honorable Donald Harris, Circuit Judge for Lewis County, Tennessee. The case was tried before twelve jurors on the issue of what damages, if any, were due to Paula Keeton as a result of the negligence of Robert A. Klein. The issue of liability had been resolved by a prior jury trial, which was heard on the 4th and 5th days of June, 2003. Judge Harris entered an Order on the prior jury trial on the 20th day of June, 2003 which attributed 90% of the fault for the accident to Robert Klein and 10% of the fault for the accident to Tabitha Keeton. The jury was hung on the issue of damages to be awarded at the prior trial and a mistrial on the damages issue was declared. In the present trial, the jury, after hearing the arguments of counsel, hearing the evidence, and after being fully instructed by the Court on the law, rendered a verdict for the Plaintiff Paula Keeton in the amount of Three Hundred

[1] Tabitha Keeton had settled her case with Klein before the June 4th and 5th trial.

Thousand Dollars ($300,000). Further noted from the record in this case, Robert Klein had individually been discharged with a Chapter 7 bankruptcy and the Plaintiff was proceeding against the insurance company for Robert Klein, as well as the underinsured carrier for the Plaintiff. Mr. Klein's counsel, outside the presence of the jury, and on the record, stipulated that Mr. Klein's insurance limits were $25,000, the insurance company for Mr. Klein being Shelter Insurance Company. The pleadings filed by the unnamed Defendant, the underinsured carrier for Paula Keeton, established that Tennessee Farmers Mutual Insurance Company had a limit of $50,000 per person. This figure was not challenged by Mrs. Keeton at trial.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff is awarded Two Hundred Seventy Thousand Dollars ($270,000.00) verdict against the Defendant Robert A. Klein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the judgment against Mr. Klein is collectible only on the limits of the applicable insurance companies.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Shelter Insurance Company, as the insurance carrier for Robert A. Klein, is responsible for Twenty-Five Thousand Dollars ($25,000) of this judgment.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Tennessee Farmers Mutual Insurance Company, the underinsured carrier for Paula Keeton, is responsible for an additional Twenty-Five Thousand Dollars ($25,000) in that Tennessee Farmers Mutual Insurance Company is entitled to a $25,000 reduction in their $50,000 policy for the money to be paid by Shelter Insurance Company.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the costs of this cause are assessed against Robert A. Klein, to be paid by the respective insurance companies set forth above.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that execution may issue on this judgment, if necessary.

Enter this 26th day of January, 2005.

By order of February 16, 2005, the trial court awarded discretionary costs against "Mr. Klein and his insurance company, Shelter Insurance." That order reads in pertinent part as follows:

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Plaintiff is awarded discretionary costs in the amount of $2,742.10 against Mr. Klein and his insurance company, Shelter Insurance. As set forth in the Judgment, the

discretionary costs shall be paid by Shelter Insurance Company in that Mr. Klein has been granted a Chapter 7 bankruptcy.

In its second post-trial order entered on the same day, the trial court made the following award of ten percent (10%) prejudgment interest.

> The Court finds that the Plaintiff has been deprived of the use of these funds for an extended period of time to the detriment of the Plaintiff and the benefit of the insurance companies involved. The Court further finds that the Plaintiff has attempted to move this case forward to a conclusion for an extended period of time and that the Defendants have resisted those efforts to conclude this lawsuit. The Court finds that the Plaintiff is entitled to prejudgment interest from the date of September 19, 2002, when the Defendant was granted a continuance over the Plaintiff's objection, until the judgment was signed by this Court on the 26th day of January, 2005. The interest is calculated at ten percent (10%) simple interest on the $50,000 of collectible insurance. The prejudgment interest is assessed against the respective insurance Defendants on the judgment amounts set forth in the judgment of this court.
>
> It is, therefore, ORDERED, ADJUDGED AND DECREED that the plaintiff is awarded prejudgment interest against Shelter Insurance Company and Tennessee Farmers' Mutual Insurance Company in the amount of $11,774.50.

From the trial court's denial of the Motion to Continue, its conduct of the trial in the absence of the defendant, its award of prejudgment interest and discretionary costs, and its requirement that said costs and interest be paid by the unnamed uninsured carrier and Mr. Klein's liability carrier, Mr. Klein appeals.

On appeal, Mr. Klein asserts the issues to be:

1. Did the Trial Court err in denying Defendant's request for continuance pursuant to the Soldiers' and Sailors' Civil Relief Act?

2. Did the Trial Court err in awarding Plaintiff prejudgment interest in this personal injury action in contravention of this Court's decision in *Hollis v. Doerflinger*, 137 S.W.3d 615 (Tenn.Ct.App.2003).

3. Did the Trial Court err in awarding Plaintiff's discretionary costs for the expert fee and deposition costs for Dr. James O'Brien when Plaintiff, herself, attempted to exclude Dr. O'Brien's testimony?

4. Did the Trial Court err in naming Defendant's Insurance Company individually liable for prejudgment interest and discretionary costs?

At the outset, Appellee asserts that all issues raised by Appellant on appeal have been waived because of failure of Appellant to file a Motion for a New Trial, bringing such issues before the trial judge. Tennessee Rule of Appellate Procedure 3(e) provides in pertinent part:

> [I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise, such issues will be treated as waived.

Tenn.R.App.P. 3(e).

In an elaborate discussion, Justice Harbison made clear the scope of Tennessee Rule of Appellate Procedure 3(e) in jury cases.

> By its terms, the rule applies only to cases tried by a jury. The fee fixed by the trial judge in the present case was not fixed by the jury nor was the amount thereof even submitted for jury consideration, insofar as we can ascertain. Unless appellants otherwise waived the issue or in some other manner acquiesced in the procedure followed by the trial judge, the question should have been considered by the Court of Appeals. We specifically hold that appellants did not waive the issue by failing to file a motion for a new trial or other motion under Rule 59, T.R.C.P.
>
> As stated previously, in our opinion, the case cited by the majority, *Memphis St. Ry. Co. v. Johnson*, *supra*, was correctly decided upon the issues and facts presented to the Court. It does not, however, stand for the proposition that all error of the trial judge, committed after trial and without participation by the jury, must be brought back for further consideration by the trial court on a motion under Rule 59, T.R.C.P. before such issued can be considered on appeal. The requirement of a motion for new trial was indeed more rigid in the past, and it was at times carried to great extremes. For example, it formerly was the rule in this state that where the trial judge set aside a jury verdict for the plaintiff upon the defendant's post-trial motion and directed a verdict for the defendant, the plaintiff could not have that action reviewed unless he himself then filed a further, additional motion in the trial court. *See Howell v. Wallace E. Johnson, Inc.*, 42 Tenn.App. 15, 298 S.W.2d 753 (1956). This rule was expressly changed by the adoption of Rule 50.05, T.R.C.P. The language of Rule 3(e) of the Appellate Rule is consistent with Rule 50, T.R.C.P., and is limited to issues which were tired to the jury, to jury misconduct and to other events occurring during a jury trial or in some other way involving the jury, its verdict or instructions to that body. It was not intended to apply to actions of the trial judge such as those involved in the present case.

The majority of the Court of Appeals stated:

> "Where an appellant is dissatisfied with the verdict of the jury, it is necessary to file a motion for a new trial."

This statement, insofar as it goes, is correct, but in the present case appellants were in no way dissatisfied with the jury verdict. The excess of the judgment awarded to the tenants over that awarded to the landlords was small, and appellants apparently have acquiesced therein. Their complaint is not with the jury verdict but with the action of the trial judge in undertaking herself to set a fee, with the amount thereof, and with the procedures involved in setting that amount.

When the rules governing appellate procedure were revised, the motion for a new trial was retained as an important step of post-trial and appellate procedure in jury cases. This was done so that the trial judge might be given an opportunity to consider or to reconsider alleged errors committed during the course of the trial or other matters affecting the jury or the verdict, such as alleged misconduct of jurors, parties, or counsel which either occurred after the trial or could not reasonably have been discovered until after the verdict. Motions for a new trial have been optional, not mandatory, for many years in non-jury cases. Under Rule 59, T.R.C.P., a party may request a trial judge in a non-jury matter to reconsider actions which the judge has taken, but this is not, nor should it be, a prerequisite to appellate review of thos actions.

Although this case involved a jury trial, the post-trial proceedings sought to be reviewed were not related to any error embraced within Rule 3(e), T.R.A.P. We have noted above that the requirements of that rule with respect to post-trial motions do not pertain to all actions taken by a trial judge after the verdict of a jury has been rendered. Other examples than those mentioned above could be cited. For example if a trial judge suggests a remittitur after verdict and upon defendant's post-trial motion, the plaintiff is not required to file another post-trial motion in order to accept the remittitur under protest and to seek appellate review.

McCormic v. Smith, 659 S.W.2d 804, 806-7 (Tenn.1983).

The two motions for a continuance filed by Mr. Klein in the trial court were filed prior to the beginning of the jury trial and not during the course of the trial. This distinction was important in *Mires v. Clay*, 3 S.W.3d 463, 467 (Tenn.Ct.App.1999) in which this Court held that a motion for a new trial was necessary to prevent waiver of the issue under Tennessee Rule of Appellate Procedure 3(e) when such motion was made during the course of the jury trial. "Since Appellant's motion for continuance was not made until after the jury was empaneled, and the alleged error was not cited in

a motion for a new trial, we believe that the issue is precluded pursuant to T.R.A.P. 3(e)." 3 S.W.3d at 467.

In addition to the waiver issue in *Mires*, this Court went on to hold:

> In any event, whether to grant a continuance is a matter that lies within the sound discretion of the trial court, and its decision will not be disturbed on appeal absent a showing that the court abused its discretion and that the party seeking a continuance has been prejudiced. *Blake v. Plus Mark, Inc.*, 952 S.W.2d 413 (Tenn.1997).
>
> Although Hayes has arguably been prejudiced by not having the testimony of David Clay before the jury, we cannot say that the trial court abused its discretion in denying the motion for continuance. The motion filed by Hayes states only that his efforts to locate Clay failed, and that a private investigator retained by a former co-defendant was also unsuccessful. There is no showing of due diligence, and Hayes bears some of the responsibility for his predicament. The trial court's denial of the motion will not be disturbed on appeal.

Mires, 3 S.W.3d at 467-68.

This Court followed the same alternative reasoning in *Mallard v. Thompkins*, 44 S.W.3d 73 (Tenn.Ct.App.2000).

> Mrs. Mallard's attorney filed a Motion for a continuance two weeks before the trial was scheduled to begin. He argued that he needed additional time to either find a particular x-ray of Mr. Mallard's leg that he claimed would support his theory of negligence, or to explore the reason that Baptist Hospital said the x-ray had been destroyed. The trial court denied the motion. Appellant argues here that the trial court's denial of the Motion for Continuance constitutes reversible error.
>
> The appellant failed to raise this issue in the Motion for New Trial, however, and it therefore must be deemed to have been waived, under Rule 3(e) of the Rule of Appellate Procedure, which reads in pertinent part,
>
> > In all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instruction granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought,[2] unless the

[2]The scope of this phrase "or other ground upon which a new trial is sought" has an indefinite meaning which may account for the dual approach in *Mires* and *Myint*.

> same was specifically stated in a motion for new trial; otherwise such issues will be treated as waived.
>
> But even if Mrs. Mallard had raised the issue of the continuance in her Motion for New Trial, we do not believe she would be entitled to prevail on appeal. The decision of a trial court to grant or deny a continuance is within the court's discretion, and will not be reversed absent a clear showing of abuse of that discretion. *Russell v. Crutchfield*, 988 S.W.2d 168 (Tenn.Ct.App.1998). In view of the interest of our court system in resolving cases as quickly and expeditiously as possible, and of the fact that the appellant did not even request copies of the more than four year-old x-rays until a few weeks prior to trial, we do not think that the trial court abused its discretion in refusing the continuance.

44 S.W.3d at 77-78.

While there may be some question of whether or not a pre-trial motion to continue is within the purview of Tennessee Rule of Appellate Procedure 3(e), it is clear as held in *Mallard* that the decision of a trial court to grant or deny a continuance is within the discretion of the trial court and will not be reversed absent a clear showing of abuse of discretion. *Russell v. Crutchfield*, 988 S.W.2d 168, 170 (Tenn.Ct.App.1998). The motions for a continuance in the case at bar assert as ground therefor that the defendant was a witness to the collision and to statements made by the plaintiffs in this matter. It further asserts that Mr. Klein should have an "opportunity to mitigate or explain any statements extracted from him during cross-examination of him by Plaintiffs during his deposition." Appellant however offered the trial court in support of the motion for a continuance no evidence of any alleged statements made by the plaintiffs and no evidence that Mr. Klein would in any way refute his clear and unambiguous statements made under oath in his discovery deposition.[3] Mr. Klein testified in his deposition:

> Q. And describe the highway for me; how many lanes is it?
> A. A two-lane.
> Q. If you were going to make a turn, a left-hand turn, is there a turning lane or do you just have to stop in your lane and turn from your lane?
> A. You've got to turn from your lane.
> Q. Where did the accident occur; which lane did the accident occur in?
> A. The left lane.
> Q. The opposite lane in which you were driving?
> A. Yes, sir.
> Q. And tell me how the accident happened?
> A. I was coming up on a vehicle and I didn't see the second vehicle in front of the first one, and I just noticed it was going slow, around forty miles an hour, and I decided to pass, and that's when I – – after I was halfway between my car and their

[3] The deposition of a party to the litigation may be used by an adverse party for any purpose. T.R.C.P. 32.01(2).

car I noticed the Keetons' car. And when I got up close to theirs, she turned to go on her road; that's when I hit her.

Q. Was that a passing zone you were in?
A. Yes, sir.
Q. Do you know whether the Keetons had their signal light on indicating they were turning?
A. No, sir.
Q. You don't know one way or the other?
A. No, sir.
Q. And that's because there was a car between the two of you?
A. Yes, sir.
Q. And the car in front of you had been slowing or was going slow and that's why you were passing it?
A. Yes, sir.
Q. Did it have its brake lights on or do you remember?
A. I don't remember.
Q. Could have had its brake lights on?
A. Yes, sir.
Q. Do you believe the accident was your fault?
A. Yes, sir.

MR. CROFFORD: That's all I have for this witness.

A stay or continuance under the Soldiers' and Sailors' Relief Act has never been automatic but rests in the sound discretion of the trial court and in the absence of prejudice to the ability of the serviceman to present his case, such trial court discretion will not be disturbed on appeal. *Boone v. Lightner*, 319 U.S. 561, 575, 63 S.Ct. 1223, 87 L.Ed. 1587 (U.S.1943).

The trial court found:

> Based on the information provided to the court, as set forth above, and the record as a whole, the court found that the defense is not materially affected by reason of the military service of Mr. Klein. The Motion to Continue was therefore denied.

The trial court did not abuse its discretion in denying a continuance. *Mallard*, 44 S.W.3d 73 (Tenn.Ct.App.2000); *Mires v. Clay*, 3 S.W.3d 463 (Tenn.Ct.App.1999).

Because the issues of discretionary costs and the assessment thereof to the defendant Shelter Insurance Company are unrelated to the jury verdict, but are both post-jury verdict and judgment actions by the trial court, they are not waived under Tennessee Rule of Appellate Procedure 3(e). *McCormic v. Smith*, 659 S.W.2d 804 (Tenn.1983). Both actions, however, are clearly within the discretion of the trial court. Tenn.R.Civ.P. 54.04. The trial court did not abuse its discretion in allowing discretionary costs. As a result of Mr. Klein's 2002 bankruptcy and the subsequent agreed

order lifting that bankruptcy only as to insurance proceeds, the only funds available to pay a judgment were the $25,000 of insurance coverage provided by Shelter Insurance. To the extent that Shelter Insurance participated in contesting the award, it acted as the real party in interest and rightfully bears the burden of discretionary costs.

This brings us to the troublesome issue of prejudgment interest in the personal injury case.

If prejudgment interest is allowable in personal injury suits for unliquidated damages in Tennessee, we would have little difficulty in upholding the award by the trial court, not only under the applicable abuse of discretion standard on appeal, but as being eminently correct under the facts of this case. *Spencer v. A-1 Crane Serv., Inc.*, 880 S.W.2d 938 (Tenn.1994) and *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920 (Tenn.1998) to the contrary notwithstanding, this Court can see no way around the rule laid down in *Hollis v. Doerflinger*, 130 S.W.3d 625 (Tenn.Ct.App.2003). In that case, this Court held:

> Section 47-14-123 of the Tennessee Code Annotated allows for an award of prejudgment interest if such an award was permitted under the statutory and caselaw of Tennessee on April 1, 1979. Tenn.Code Ann. § 47-14-123 (2001). An award of prejudgment interest, however, is not permitted in a personal injury lawsuit such as a wrongful death action. *See McKinley v. Simha*, No. W2001002647-COA-R3-CV, 2002 WL 31895715. *22, 2002 Tenn.App. LEXIS 941, at *59-66 (relying on *Louisville & N.R. Co. v. Wallace*, 91 Tenn. 35, 17 S.W. 882 (1891) ("[Prejudgment interest] is certainly not allowed in such actions as . . . personal injury by negligence . . . ."). Thus, the award of prejudgment interest against Mother's estate must be reversed.

Hollis, 137 S.W.3d at 630.

Hollis was published at the express direction of the Tennessee Supreme Court under Tennessee Supreme Court 4(D) which provides:

> If an application for permission to appeal is filed and denied with the recommendation that the intermediate appellate court opinion by published, the author of the intermediate appellate court opinion shall ensure that the opinion is published in the official reporter.

Tennessee Supreme Court Rule 4(H)(2) provides "opinions reported in the official reporter, however, shall be considered controlling authority for all purposes unless and until such opinion is reversed or modified by a court of competent jurisdiction."

Since *Hollis* post dated both *Myint* and *Spencer*, courts in Tennessee are bound by *Hollis* until such time as the Supreme Court determines otherwise.

The trial court erred in granting prejudgment interest in the case.

The judgment of the trial court granting prejudgment interest is reversed. The judgment of the trial court in all other respects is affirmed and the case remanded to the trial court for such further proceedings as may be necessary. Costs of the cause are assessed one-third to Appellees and two-thirds to Appellant.

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WILLIAM B. CAIN, JUDGE